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# In the Supreme Court of the United States

OCTOBER TERM, 1998

ANITA DAVIS, LEE HARRIS, LAFAYE DENISE BIRCH, MALACHI ANDREWS, AND KIM T. LYLES, PETITIONERS

*v.*

JEB BUSH, GOVERNOR OF FLORIDA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

Whether, consistent with Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended, a State's interest in maintaining its current system of at-large elections for trial court judges may preclude as a matter of law any remedy that would alter that judicial model, even if the existing model denies minority voters an equal opportunity to participate in the political process and elect candidates of their choice.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

### STATEMENT

1. a. This case arises out of a challenge under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended, to Florida's system for electing judges to both tiers of the State's trial courts in the northern part of the State: the Second Judicial Circuit Court and the Leon County Court.

Florida's circuit courts have general jurisdiction over civil and criminal matters, while its county courts have limited jurisdiction over misdemeanor and small claims

cases specified by statute. See Fla. Stat. Ann. § 34.01 (West 1998). The Second Judicial Circuit Court encompasses six counties (including Leon County), and currently has 11 judges, elected in circuit-wide voting for six-year terms. Pet. App. 2a-4a & n.2, 104a-105a. The Leon County Court has four judges, elected in county-wide voting for four-year terms. *Id.* at 2a-3a, 104a-105a.

Judges are elected to both courts through at-large voting under a numbered-post system. Each candidate for a seat on either court must select and run for a particular numbered position on that court. A candidate must obtain a majority of the votes cast for that position in order to be elected. Pet. App. 3a & n.1, 105a.

When a vacancy occurs between elections, the Governor has the authority to fill the vacancy by choosing from a list of candidates prepared by a judicial nominating commission. Fla. Const. Art. 5, § 11(b); Pet. App. 3a. While the appointment process has played a significant role in the selection of judges for the Leon County Court, judges on the Second Judicial Circuit Court have primarily obtained their seats through election. *Id.* at 6a, 48a.

b. The evidence established that blacks constitute 26.1% of the voting age population in the Second Judicial Circuit, and 22.2% of the voting age population in Leon County. Pet. App. 2a- 3a, 104a-105a. Voting in both Second Judicial Circuit and Leon County elections is racially polarized. *Id.* at 3a, 33a. In judicial elections involving both black and white candidates, the overwhelming majority of black voters have supported black candidates, while the majority of white voters have supported white candidates. That has been true regardless of whether the black candidate was competing for an open seat or against a white incumbent.

*Id.* at 3a-4a, 49a. In addition, in 11 elections for positions on the two courts where all candidates were white and where black and white voters preferred different candidates, "black voters have never succeeded in electing their first choice candidate." *Id.* at 5a; accord, *id.* at 40a-41a.

At the time of the district court's initial finding of a Section 2 violation in 1992, no black person had ever been elected or appointed to any of the judicial positions on the Second Judicial Circuit Court or the Leon County Court. Pet. App. 123a.[1] Nor, since 1976, had any black person been elected to any other office in circuit-wide voting or county-wide voting in Leon County, although black candidates had run in numerous contests during that time. *Ibid.*

2. a. Petitioners are black citizens living in the Second Judicial Circuit and in Leon County. In 1990, they filed this class action suit under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended, to challenge the legality of the judicial election systems in those jurisdictions. Pet. App. 6a, 103a-104a & n.1.[2]

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[1] After the district court's finding of a Section 2 violation, the State legislature created an additional seat on the Second Judicial Circuit, and the Governor appointed a black lawyer to that seat. See Pet. App. 3a-4a n.2, 6a n.6, 9a n.13. The court of appeals noted that such election or appointment of minority candidates during the pendency of Section 2 litigation is of little probative value. *Id.* at 3a-4a n.2, 6a n.6 (citing *Thornburg* v. *Gingles*, 478 U.S. 30, 76 (1986)).

[2] Petitioners also brought a claim under 42 U.S.C. 1983, alleging that the judicial election systems violate their rights under the Fourteenth and Fifteenth Amendments. Pet. App. 104a. The district court rejected that claim, finding that the election systems were not established or maintained for a discriminatory purpose. *Id.* at 139a. Petitioners did not appeal that ruling and it is not before this Court.

On September 3, 1992, after a bench trial, the district court entered judgment for petitioners. Pet. App. 103a-148a. The court found that petitioners had established for both jurisdictions the three preconditions necessary, under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), to establish vote dilution in a Section 2 challenge to at-large elections: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) that the minority group voters are "politically cohesive," and (3) that "the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." Pet. App. 108a-109a (quoting *Gingles*, 478 U.S. at 50-51); *id.* at 111a- 123a.

The court further concluded that, "under the totality of the circumstances, the current at-large system for electing Second Judicial Circuit and Leon County Court judges denies black voters an equal opportunity to participate in the political process and to elect candidates of their choice, in violation of Section 2." Pet. App. 139a. The court directed the parties to file submissions concerning an appropriate remedy. *Id.* at 9a, 140a.

b. Shortly after its ruling in favor of petitioners on liability, the court "stayed further proceedings during the 1993 session of the Florida legislature in order to allow the state to develop a remedy." Pet. App. 9a. Subsequently, the court extended the stay pending the Eleventh Circuit's en banc decision in *Nipper* v. *Smith*, 39 F.3d 1494 (1994), cert. denied, 514 U.S. 1083 (1995). Pet. App. 9a. After the Eleventh Circuit issued that decision and its decision in *Southern Christian Leadership Conference* v. *Sessions*, 56 F.3d 1281 (1995) (en banc), cert. denied, 516 U.S. 1045 (1996), the district court reconvened the proceedings to address the

question of remedy and ultimately set the case for retrial on the Section 2 issue. Pet. App. 9a, 29a-30a & n.2.

On July 21, 1996, the district court entered judgment for respondents. Pet. App. 29a-102a. The court emphasized that new evidence at the retrial did not contradict the court's "previous finding of widespread racially polarized voting within Florida's Second Judicial Circuit and Leon County, Florida." *Id.* at 33a. The court also found that "incumbency does not explain the racially polarized voting patterns found here." *Id.* at 49a. Thus, the court again ruled that petitioners had established the second and third *Gingles* preconditions of political cohesion of minority voters and bloc voting of the white majority. *Id.* at 50a.

With regard to the first *Gingles* factor, however, the court reversed its earlier ruling. The court ruled that, under *Nipper*, petitioners could not meet their prima facie burden in a Section 2 vote-dilution case unless they presented, as part of the first *Gingles* factor, a remedy "within the confines of the state's judicial model." Pet. App. 50a (citing *Nipper*, 39 F.3d at 1530-1531). The court rejected all of the remedies proposed by petitioners—which included several different proposals for subdistricting, and several other proposals for cumulative or limited voting within the existing at-large districts—as not being within Florida's "judicial model," and concluded that petitioners had not met their burden of showing a permissible remedy under the *Nipper* standard. *Id.* at 68a-80a.[3]

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[3] The court also found that petitioners' proposed plans were unconstitutional under *Shaw* v. *Reno*, 509 U.S. 630 (1993), and its progeny, because they were drawn for predominately race-based reasons and could not survive strict scrutiny. Pet. App. 62a-67a.

In particular, the court ruled that the proposed subdistricting would break the linkage otherwise provided by Florida law between the territorial jurisdiction of the judges on the two courts and their electoral bases, Pet. App. 74a-77a, and that this flaw could not be cured by a proposed circuit-wide or county-wide approval vote or retention vote because such a vote would require changes in Florida law. The court rejected the proposed at-large voting plans because cumulative and limited voting would also require changes in Florida law, in violation of *Nipper*'s requirement of a remedy that can exist within the confines of the State's judicial model. See *id.* at 51a-62a, 68a- 82a.

3. The court of appeals affirmed. Pet. App. 1a-28a.[4] The court of appeals agreed with the district court's finding that racially polarized voting plagued the electoral systems at issue. The court of appeals noted that as a result "black candidates [have] little hope of achieving judicial office," *id.* at 18a, and "black voters lack the ability to play even a 'swing' role within the two election districts, whatever the race of the candidates." *Id.* at 5a. The court noted that "black candidates' lack of electoral success is not simply the result of incumbency," *id.* at 4a n.4, and that "black voters cannot rely on the appointment process to offset the effects of racially polarized voting," *id.* at 5a-6a. The court cited the district court's finding that "there is more evidence to support a finding of racially polarized

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[4] The court rejected the district court's holding that petitioners' proposed subdistricts would constitute racial gerrymandering in violation of the Equal Protection Clause, Pet. App. 22a-28a, with one judge declining to join the relevant portion of the opinion. *Id.* at 28a (Fay, J., concurring specially).

voting in this case than there was in *Gingles*." *Id.* at 8a n.12.

Nonetheless, the court rejected petitioners' Section 2 claim on the ground that the Eleventh Circuit's Section 2 precedents "foreclose any significant restructuring of a state's judicial election system." Pet. App. 2a. The court reiterated its holding in *Nipper* that a Section 2 plaintiff must demonstrate the existence of a remedy within the confines of the State's judicial model, as part of his or her prima facie case, and held that petitioners had failed to do so, because each of their proposed remedies required extensive changes to the judicial model set forth in Florida law. *Id.* at 10a-22a.

The court concluded that it was compelled by circuit precedent to hold that the State's interest "in maintaining its judicial model and in preserving such linkage" outweighs petitioners' interest in "ameliorating the effects of racial polarization in at-large judicial elections." Pet. App. 20a.[5] The court emphasized, however, that it was "troubled by the apparent presumption in favor of status-quo polarization" under Eleventh Circuit precedent, *id.* at 14a, which "foreclose[s] any significant restructuring of a state's judicial election system," *id.* at 2a. The court further explained that it was "troubled by the analysis and the conclusion that [the Eleventh Circuit's] precedents appear to require in cases such as the one at bar." *Id.* at 20a. The court declared that, in interpreting the Supreme Court's

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[5] The court summarily rejected petitioners' proffered plans for cumulative or limited voting within the at-large districts because the Eleventh Circuit had already rejected those remedies in *Nipper* based on the fact that they would require the elimination of Florida's numbered-post system for judicial elections and force incumbent judges to run against each other. Pet. App. 6a-7a n.7.

decisions that held that Section 2 applies to state judicial elections—*Houston Lawyers' Ass'n* v. *Attorney General*, 501 U.S. 419 (1991) and *Chisom* v. *Roemer*, 501 U.S. 380 (1991) — the Eleventh Circuit

> has placed what now seems, in hindsight, to be an insurmountable weight on a state's interest in preserving its constitution's judicial selection system and in maintaining linkage between its judges' jurisdictions and electoral bases. Together with *Nipper*, *SCLC*, and the additional case of *White* v. *Alabama*, we will with this decision have disallowed redistricting, subdistricting, modified subdistricting, cumulative voting, limited voting, special nomination, and any conceivable variant thereof as remedies for racially polarized voting in at-large judicial elections.

Pet. App. 21a. The court was therefore unable "to envision any remedy that a court might adopt in a Section Two vote dilution challenge to a multi-member judicial election district," and concluded that, therefore, in the Eleventh Circuit, "Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections." *Ibid.* The court explicitly noted that this "doctrinal development appears to conflict with the Supreme Court's initial pronouncements on this subject in *Chisom* and *Houston Lawyers*," but nonetheless felt bound to adhere to circuit precedent. *Ibid.*

The court of appeals denied respondents' petition for rehearing and suggestion of rehearing en banc. Pet. App. 149a-150a; see Pet. 11 n.5.

## DISCUSSION

The petition for a writ of certiorari should be granted. The court of appeals has held that a plaintiff alleging that an at-large judicial election system results in unlawful vote dilution under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973, must establish, as part of a prima facie case, the availability of a permissible remedy that does not require any significant alteration to the State's current judicial election system. That ruling renders Section 2 inapplicable "in any meaningful way, to at-large judicial elections" in the Eleventh Circuit, Pet. App. 21a, and cannot be squared with the Court's holding in *Houston Lawyers' Ass'n* v. *Attorney General*, 501 U.S. 419, 427 (1991), that Section 2 applies to such elections.

The court of appeals' ruling also appears to conflict with decisions of the Fifth, Sixth, and Seventh Circuits. Each of those courts has held that a State's interest in maintaining a link between the territorial jurisdiction and the electoral base of a judge is a legitimate interest entitled to be weighed, but cannot always defeat a Section 2 vote dilution challenge. The Eleventh Circuit, by contrast, has effectively held that the State's interest "in maintaining its judicial model" will always outweigh an interest, however strong, in "ameliorating the effects of racial polarization in at-large judicial elections," Pet. App. 20a.

This Court should grant certiorari to establish that Section 2 can provide a remedy for vote dilution in an at-large system of electing judges even where the remedy might require some structural change in the at-large election system.

1. a. As the court of appeals acknowledged (Pet. App. 21a), it has essentially foreclosed any finding of a

Section 2 violation in a case involving at-large judicial elections, by effectively holding that a State's interest in maintaining its current judicial model always outweighs any evidence, however strong, that the judicial model results in minority vote dilution.

That ruling is inconsistent with this Court's holding in *Houston Lawyers' Ass'n* v. *Attorney General*, *supra*. In that case, the Court ruled that the results test of Section 2 applies to claims of vote dilution in elections of trial judges. 501 U.S. at 425-426. The Court held that a State's interest in maintaining a "link between a district judge's jurisdiction and the area of residency of his or her voters" is a legitimate factor for courts to consider in determining the viability of a Section 2 claim, but that it "does not automatically, and in every case, outweigh proof of racial vote dilution." *Id.* at 426-427. In particular, a State's interest cannot place an at-large judicial election system beyond Section 2 coverage, if the "impairment of a minority group's voting strength could be remedied without significantly impairing the State's interest in electing judges on a district-wide basis." *Id.* at 428.

Contrary to the Court's holding in *Houston Lawyers' Ass'n*, the Eleventh Circuit has effectively created an automatic exemption from the coverage of Section 2 for dilutive at-large judicial election systems. In this case, both courts below agreed that there was highly persuasive evidence of severe racial polarization and minority vote dilution. In fact, they recognized that "there is more evidence to support a finding of racially polarized voting in this case than there was in [*Thornburg* v.] *Gingles*," 478 U.S. 30 (1986). Pet. App. 8a n.12.

The court of appeals, however, ruled that petitioners failed to prove a Section 2 violation because any conceivable remedy for that vote dilution would alter

the State's "judicial model," citing *Nipper* v. *Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995). Pet. App. 11a-22a. The court explained that in its view *Gingles* requires a plaintiff raising a Section 2 challenge to an at-large judicial election system to demonstrate the existence of a remedy "within the confines of the state's judicial model." *Id.* at 13a-14a (quoting *Nipper*, 39 F.3d at 1531). The court of appeals also relied on *Holder* v. *Hall*, 512 U.S. 874, 880 (1994), to support its view that any Section 2 remedy cannot alter the State's judicial election model. Pet. App. 14a; see *Nipper*, 39 F.3d at 1531-1533.

The Eleventh Circuit has misconstrued both *Gingles* and *Holder*. There is no support for the Eleventh Circuit's view (see *Nipper*, 39 F.3d at 1531) that "[i]mplicit" in the first *Gingles* factor is a requirement that Section 2 plaintiffs establish the existence of a remedy within the State's current judicial model. *Gingles* set forth three factors to assist a court in determining whether a challenged multi-member district itself, and not some other circumstance, is responsible for denying minority voters full participation in the political process. *Gingles*, 478 U.S. at 48-51 & n.17; see p. 4, *supra*. The first *Gingles* factor—that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," 478 U.S. at 50,—like the other factors, tends to show such causation by showing that, absent the challenged practice or structure, the minority group would have been able to elect representatives of its own choice. In *Gingles*, the Court did not suggest that the remedy must be found within the State's existing electoral model.

Nor did the Court so suggest in *Holder*. The Eleventh Circuit mistakenly views *Holder* as establishing that the failure to identify "a workable remedy within the confines of the state's system of government" is fatal to a Section 2 vote-dilution challenge to at-large judicial elections (see *Nipper*, 39 F.3d at 1533). *Holder* merely held that a Section 2 vote-dilution challenge to the size of a single-member county commission must fail in the absence of any principled reason for selecting one alternative benchmark—or proposed remedy—over another. 512 U.S. at 881-882 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J.). The Court noted, however, that "[i]n certain cases, the benchmark for comparison in a § 2 dilution suit is obvious," *id.* at 880, and Justice O'Connor specifically cited, as an example of a case with a self-evident benchmark, "a challenge to a multimember at-large system," where "a court may compare it to a system of multiple single-member districts," *id.* at 888 (O'Connor, J., concurring) (citing *Gingles*, 478 U.S. at 38, 50); see also *ibid.* (O'Connor, J., concurring) ("a court may assess the dilutive effect of majority vote requirements, numbered posts, staggered terms, residency requirements, or anti-single- shot rules by comparing the election results under a system with the challenged practice to the results under a system without the challenged practice"). Thus, in *Holder*, the Court did not suggest that a remedy must be found within the confines of the existing electoral model. Rather, the plurality ruled only that, because of the absence of an obvious alternative benchmark in the particular circumstances of that case, it could not conclude that the challenged system was responsible for vote dilution.

The Eleventh Circuit's interpretation of *Gingles* and *Holder* misconceives the appropriate role of the State's

interest under Section 2. It has long been the rule that, where unlawful vote dilution exists, some alteration in the State's election system is necessary to remedy the violation. See S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982) ("The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice."). To be sure, the remedy must not "intrude upon state policy any more than necessary." *Whitcomb* v. *Chavis*, 403 U.S. 124, 160 (1971). The Court has indicated that a State should be given the first opportunity to propose a remedial plan to take into account its interests that are not inconsistent with remedying the unlawful vote dilution, and that a court's modifications to such a plan should be "limited to those necessary to cure any constitutional or statutory defect." *Upham* v. *Seamon*, 456 U.S. 37, 43 (1982) (per curiam). But the fact that an adequate remedy may require some alteration of the State's current system does not foreclose relief as a matter of law. See *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993) (where state Constitution is in conflict with Voting Rights Act of 1965, Supremacy Clause, U.S. Const. Art. VI, Cl. 2, requires giving preference to federal law).

b. The Eleventh Circuit's erroneous categorical approach led it to conclude that the State's interest in maintaining its judicial model outweighs the interest in remedying vote dilution, and to reach that conclusion on the basis of circuit precedent, without considering whether the strength of the evidence of vote dilution in this particular case might call for a different result.

After determining that the State had an interest in maintaining a link between the territorial jurisdiction

and electoral base of its trial judges, the Eleventh Circuit noted that petitioners' subdistricting proposal attempted to preserve that interest by subjecting judges nominated from subdistricts to approval or retention in circuit-wide or county-wide elections. Pet. App. 16a-17a. The court nonetheless concluded that petitioners' proposal "would substantially vitiate Florida's linkage interest," *id.* at 17a, and ultimately ruled that petitioners' claim must fail based on the fact that the court, in previous cases, had held that "a state's interest in maintaining its judicial model and in preserving such linkage outweighed plaintiffs' interest in ameliorating the effects of racial polarization in at-large judicial elections." *Id.* at 20a. The court failed to take into account that Florida often subordinates its interest in linkage to other considerations, such as administrative convenience. *Id.* at 75a-76a; see also *Nipper*, 39 F.3d at 1558 (Hatchett, J., dissenting).[6] The court did not consider petitioners' evidence that other States have successfully implemented election of trial judges from subdistricts as a remedy for racially polarized voting, and have not suffered the adverse effects on the administration of justice augured by the Eleventh Circuit. Pet. 7; see also *Nipper*, 39 F.3d at 1558 (Hatchett, J., dissenting) (describing use of subdistricts in other States, including Mississippi, Louisiana, and New York).

The court also summarily rejected, based on circuit precedent and without any case-specific analysis, the use of cumulative or limited voting on a jurisdiction-

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[6] Indeed, as Judge Hatchett noted, "[e]ven when sitting in their own districts, judges must frequently decide cases involving litigants from different districts," and presumably are capable of doing so impartially. *Nipper*, 39 F.3d at 1558 (dissenting).

wide basis.[7] Both those proposals would preserve the State's asserted interest in maintaining linkage between electoral and jurisdictional boundaries, while giving minority voters some opportunity to elect candidates of their choice. Petitioners presented substantial evidence in support of those alternatives, and the State did not offer any evidence to demonstrate the strength of its interests in either the at-large or numbered-post elements of its judicial model. Nevertheless, the court held, solely on the basis of *Nipper*, that both remedies were categorically impermissible because they would require alteration of Florida's numbered-post system for judicial elections. Pet. App. 6a n.7. Specifically, the court noted Chief Judge Tjoflat's assumption in *Nipper* that elimination of the numbered-post system would destroy trial judges' collegiality in administrative matters, because it would require incumbent judges to run against each other. *Ibid.* See *Nipper*, 39 F.3d at 1546 (opinion of Tjoflat, C.J., joined by Anderson, J.); cf. *id.* at 1559 (Hatchett, J., dissenting) (noting that such speculative and "trivial concerns are not the core state policy that the Supreme Court envisioned to defeat a vote dilution claim").

The record is devoid of evidence regarding the State's interest in maintaining the collegiality of its

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[7] Under a cumulative voting system, each voter may cast as many votes as there are seats to be filled, but may, if he or she chooses, allocate more than one of those votes to a single candidate. Pet. App. 59a. Under a limited voting system, the total number of votes each voter may cast is less than the number of available seats, and a voter may only cast one vote per candidate. *Id.* at 60a. Either system may be used in a multi-member jurisdiction to make it more difficult for majority bloc voting to defeat a candidate supported by minority voters. Both systems require candidates to run against each other for all available seats.

trial judges in administrative matters, or the potential effect on that interest of modifying the numbered-post system. Nor did the court present any reason why this asserted state interest would be sufficient to outweigh the existing record showing that minority votes are significantly diluted and that minority voters are unable to affect judicial elections. Nothing in the factual record in this case establishes that a State's numbered-post system should be immune to challenge in the face of a denial of equal voting opportunity to minority voters. Cf. *Gingles*, 478 U.S. at 38-39 & n.6 (noting that use of numbered-seat scheme in a multi-member district can discriminate against minority voters).

2. The court of appeals' ruling appears to conflict with decisions in the Fifth, Sixth, and Seventh Circuits. Each has held, contrary to the Eleventh Circuit, that a State's interest in linkage, and in its existing judicial election system, are entitled to be weighed, on a fact-specific basis, but not to preclusive effect, in a Section 2 challenge to at-large judicial elections.

In *League of United Latin American Citizens* v. *Clements*, 999 F.2d 831, 868 (1993) (en banc) (*LULAC*), cert. denied, 510 U.S. 1071 (1994), the Fifth Circuit held that Texas's interest in maintaining a linkage between the jurisdictional and electoral bases of its district courts was a legitimate interest that must be weighed in the totality of the circumstances to determine whether a Section 2 violation existed. The court expressly rejected "the polar extremes of the parties" who urged, on the State's part, "that the linkage interest must defeat liability in *every* case, regardless of the other circumstances in the totality," and on the plaintiffs' part, "that the linkage interest can never defeat liability under the totality of circumstances if 'illegal' dilution is otherwise established." *Id.* at 870.

The court found that Texas's interest in linkage was substantial, but ruled that "it will not always defeat § 2 liability" and that substantial evidence of minority vote dilution would defeat it. *Id.* at 876. In *Milwaukee Branch of the NAACP* v. *Thompson*, 116 F.3d 1194 (1997), cert. denied, 118 S. Ct. 853 (1998), the Seventh Circuit recognized that, under *Houston Lawyers' Ass'n*, a State's interest in maintaining linkage between the boundaries of a state judge's jurisdiction and his electoral base does not automatically outweigh proof of racial vote dilution, *id.* at 1200; it read *LULAC* and *Nipper* as holding that such an interest would, however, be "dispositive unless the plaintiffs show gross racial vote dilution." *Ibid.* In *Cousin* v. *McWherter*, 46 F.3d 568 (1995), the Sixth Circuit held that Tennessee had a substantial interest in preserving linkage between the judiciary's electorate and jurisdiction, but recognized that it could be outweighed by evidence supporting the dilution claim. *Id.* at 575-577.

In each of these cases, the court ultimately rejected the Section 2 vote-dilution claims based on its assessment of the plaintiffs' evidence, not on any holding that the State's interest in its current judicial model had preclusive effect as a matter of law. See *LULAC*, 999 F.2d at 837, 877-893; *Thompson*, 116 F.3d at 1197-1201; *Cousin* v. *Sundquist*, 145 F.3d 818, 821-826 (6th Cir. 1998) (opinion after remand), petition for cert. pending, No. 98-598.

Unlike the Fifth, Sixth, and Seventh Circuits, the Eleventh Circuit has effectively recognized a state interest in its existing judicial election system sufficient to preclude liability altogether, in the face of overwhelming evidence of vote dilution. Under *Houston Lawyers' Ass'n*, however, once vote dilution is found, an appropriate remedy should be crafted. No particular

remedy is required, and the State should be given the first opportunity to propose an adequate remedy, but the Voting Rights Act of 1965 does not permit automatic deference in such a case to all aspects of a State's "judicial model."

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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